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Supreme Court, U.S.
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No. A-569

IN THE

Supreme Court of the United States

October Term, 1981

IN THE MATTER

OF

JEANNE STEINHARDT, as Executrix of JAMES McKEE, Jr.,

Plaintiff-Appellant,

v.

JOHNS-MANVILLE CORPORATION, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS

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Questions Presented.

Is a substantial federal question presented by the assertion that the constitutional rights of appellants and other members of their class are violated by the application of the New York statute of limitations which accrues upon the date of injury/exposure?

Does the New York Court's determination that the statute of limitations runs from the date of the injury which occurs at the time of exposure violate plaintiff's constitutional rights?

Is a discovery rule constitutionally required whenever a person suffers an injury which is not discovered until a later time?

List of Parties.

In the New York Court of Appeals, the parties involved were: Jeanne Steinhardt, as Executrix of James McKee, Jr., plaintiff, and Johns-Manville Corporation, Eagle Picher Industries, Inc., Owens-Corning Fiberglas Corporation, Armstrong Cork Company, Fibreboard Paper Products Corporation, Combustion Engineering, Inc., Pittsburgh Corning Corporation, Unarco Industries, Inc., Armstrong Contracting & Supply Corporation, Standard Asbestos Manufacturing and Insulating Co., Keene Insulation Company, Ruberoid Company, Division of GAF Corporation, Philip Carey Industries, Inc., and Rockwell Manufacturing Co., defendants.

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JOHNS-MANVILLE CORPORATION, *et al.,*

Defendants-Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS.

MOTION TO DISMISS.

Jurisdiction.

Appellant purports to invoke jurisdiction pursuant to 28 USC 1257 (2) on the grounds that the constitutional validity of the New York Statute of Limitations is drawn in

question by virtue of a decision of the New York Court of Appeals which determined that the statute of limitations barred plaintiff's claims herein.

Is is respectfully submitted that jurisdiction should properly be denied.

Statement of the Case.

This action was instituted in August, 1975, against numerous defendant manufacturers and suppliers of asbestos products. The claim is that Mr. McKee suffered injury and ultimately death from asbestos disease as a result of his 30 years of employment as an asbestos insulation worker. According to the Jurisdictional Statement, his last exposure to asbestos was in 1970. In April, 1973 he was diagnosed as having asbestos disease.

The plaintiff appeals from an order of the New York Court of Appeals which dismissed her complaint as barred by the statute of limitations. It is her contention that the statute of limitations should be measured from the time of discovery of the injury on the grounds that the present judicial construction has deprived her and those similarly situated of their constitutional rights.

POINT I.

Jurisdiction should be declined for want of a substantial federal question.

In order for appellant to be entitled to appeal to this Court, she must show that a substantial federal question is presented. In the words of Mr. Justice Brandeis: "[A]lthough the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not

. . . substantial in character." *Zucht v. King,* 260 US 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922). No such substantial question has been presented on the instant appeal.

The inherent nature of statutes of limitations as emphasized by this Court's approach to their application and analysis of their function leaves no doubt that they operate, where necessary, to extinguish procedural remedies, not substantive rights.

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (Citation omitted). They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. *Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual.* (Emphasis supplied).

Chase Securities Corp. v. Donaldson, 325 US 304, 315 (1944).

This approach to statutes of limitations has been adopted by the Supreme Court as a "working hypothesis" and as a matter of constitutional law. (*Id.* at 314).

The abstract logic of the distinction between substantive rights and remedial or procedural rights, although at times

difficult to apply, has been found to be a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. (*Chase, supra* at 314). Clearly, this case involves the latter situation, as there is no need for nationwide uniformity in the area of state statutes of limitations, nor is uniformity desirable since each state must determine its own policy about the privilege to litigate. (See generally *Board of Regents of the University of the State of New York v. Tomanio,* 446 US 478, 100 S.Ct. 1790, 64 L.Ed. 2d 440 [1980]).

Thus no question of a substantial character has been presented in the instant appeal. Appellants contend that the application of the New York statute of limitations has deprived them and other members of their class of their constitutional rights. At the very most, such rights are procedural in character and do not qualify as substantive in any sense. This Court has consistently maintained both the wisdom and the necessity of this distinction.

The case of *Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 [1948], upon which plaintiff so heavily relies is not dispositive of the instant appeal. *Urie* involved the construction of a statute of limitations under the Federal Employer's Liability Act. Just as the federal judicial system is empowered to interpret and apply federal statutes, so are the states empowered to interpret and apply the statutes promulgated by their respective legislatures.

In the past this Court has refused to review the application of New York statute of limitations in a similar case. *Schwartz v. Heyden Newport Chemical Corp.,* 12 NY2d 212, remittitur amended 12 NY2d 1073, cert. den. 374 US 808, 83 S.Ct. 1697, 10 L.Ed. 2d 1032 involved questions of law virtually indistinguishable from those presented on the instant appeal.

In *Schwartz,* a product called "Umbrathor," manufactured by the defendant, was inserted into plaintiff's sinuses for the purpose of making them perceptible in X-rays. Some of the substance allegedly remained in plaintiff's head and 13 years later produced a carcinoma requiring the removal of an eye. The action was commenced two years after the surgery and 15 years after the injection of the umbrathor.

The New York Court of Appeals held that the injury occurred at the time of exposure and that the statute of limitations barred plaintiff's claim. It expressly refused to adopt a discovery rule. *Id.* at 216.

As here, the Court of Appeals in *Schwartz* amended its remittitur to expressly state that a constitutional issue had been considered (12 NY2d 1073). Nonetheless, this Court denied the *Schwartz* plaintiff's petition for writ of certiorari (374 US 808, 83 S.Ct. 1697, 10 L.Ed. 2d 1032). Implicit was that there was no question meriting review by this Court. The same is as true today as it was at the time of *Schwartz.*

In addition, we note that access to a court is not, in and of itself, an independent constitutional right. (*Ortwein v. Schwab,* 410 US 656, 93 S.Ct. 1172, 35 L.Ed. 2d 572 [1973]; see also *United States v. Kras,* 409 US 434, 93 S.Ct. 631, 34 L.Ed. 2d 626 [1973]). Thus, the fact that plaintiff has been denied her day in court on the merits by virtue of the application of the New York statute of limitations does not constitute a violation of a fundamental right.

Finally, the issue raised here is whether the application of the statute of limitations violated plaintiff's constitutional rights. Since plaintiff does not challenge the statute itself but rather its application, she has no appeal as of

right (*Zucht v. King*, 260 US 174, 43 S.Ct. 24, 67 L.Ed. 194 [1922]). Indeed the *Schwartz* plaintiff realized that proper access to this Court under these circumstances was by certiorari, not direct appeal.

POINT II.

The adoption of a date of discovery rule in all state statutes of limitations is not required by the federal constitution.

It is fundamental that the determination of a time within which to sue is always a legislative prerogative (*Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 [1944]). Furthermore, the right to prescribe within what time and upon what conditions suits can be commenced and maintained is fully within the power of the state (*Wood v. Cheesborough*, 228 US 672, 33 S.Ct. 706, 57 L.Ed. 1018 [1913]). The time within which to bring an action is a matter of legislative grace and is subject to legislative control (see generally *Chase, supra* at 325 US 314).

In New York, CPLR §214 provides:

> "The following actions must be commenced within three years:
>
> * * *
>
> 5. An action to recover damages for a personal injury."

The courts of New York have construed this statute to mean that the claim dismissed on the instant appeal accrued at the time of the invasion of the body, the time when the injury actually occurred. In this case it is claimed that decedent was exposed to asbestos for 30 years. His last exposure was some 5 years before this action was

brought. New York's approach represents a sound policy decision founded upon a careful balancing of all the competing considerations. The myriad and obvious difficulties in defending such product liability actions involving exposures consummated in the dim and distant past require no elaboration. Indeed, this Court recently articulated once again its philosophy regarding the purpose and function of statutes of limitations when it said that they

> "are made for the repose of society and the protection of those who may during the limitation have lost their means of defense." *United States v. Marion,* 404 US 307, 92 S.Ct. 455, 30 L.Ed. 2d 468 [1971].

Simply put, there comes a time when the manufacturer may legitimately expect peace of mind, and when "it is unfair to require the defendant to piece together his defense to an old claim." (*Walker v. Armco Steel Corp.*, 446 US 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 [1980]).

There is nothing unique about the New York statute of limitations. The time within which to bring a tort claim for personal injury almost universally accrues at the time of the injury. The injuries to plaintiff's decedent occurred at the time of exposure. (*Thornton v. Roosevelt Hospital,* 391 NE2d 1002 [NY 1979]; Selikoff, Bader, *et al., Editorial: Asbestos and Neoplasin,* Amer. J. Medicine, 42:487-496 [1967]) The fact that a person may not know of his injury until some later time does not alter when the injury occurs, and when the statutory time begins to run.

Some states have established a discovery rule in latent disease cases.[1] The fact that the New York Court has

[1]Even if a discovery rule was applied, this claim would still be barred. New York requires that when the time to commence an action begins to run from discovery, the action must be instituted within two years. (CPLR 203[f]). This action was not brought until two years and four months after decedent was diagnosed as having an asbestos-related disease.

chosen to leave any change to the legislature is a policy decision about the privilege to litigate in that state. There is no constitutional deprivation merely because the Court chose not to invoke a discovery rule. The decision is purely a matter of state concern.

If plaintiff's contentions are true, a discovery rule is constitutionally required any time a person suffers injury not discovered until a later time.

In sum, there is no federal question involved. What is involved is the right of the New York Court to determine that it will not invoke a discovery rule in latent disease cases.

CONCLUSION.

Plaintiffs' appeal should be dismissed.

Respectfully submitted,

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